Contractors in the Workplace

Some Legal, Ethical and Practical Considerations

Office of Counsel, Naval Air Systems Command

Contractors in the Workplace

Affects us every day

- IPTs
- Advisory and assistance services
- Technical support
- Shared workspaces

Contractors in the Workplace

- **Remember: Contractor employees are not Government employees**
- **Four Areas of Concern:**
  1. **Gifts from contractors**
  2. **Use of Government resources**
  3. **Personal services**
  4. **Contractor access to non-public information**

Contractors in the Workplace
Gifts from Contractors

- **The rule -- Nothing of value can be accepted from an outside source, except:**
  - **$20/$50 exception**
  - **Coffee and donut exception**
  - **Discounts, other benefits offered to all**
  - **Greeting cards and items of little intrinsic value**
- **The rule is not suspended because the contractor shares workspace**

Contractors in the Workplace
Gifts from Contractors

Office Gifts

- Solicitation of cash contributions toward special occasion gift (i.e. farewell luncheon) for Navy employee
  - Can't solicit from contractor employees
  - Can't accept cash gifts
  - Unsolicited, non-cash gifts subject to $20 limitation

Some Common Gift Situations

- **Food**
  - Bagels/donuts, coffee and water-
    - Meeting held at CSS facility
      - Modest item of food and refreshment, not part of a meal
  - Working lunches
    - PMR and at lunch the pizzas/sandwiches arrive
      - Not a modest item of food and refreshment since it's a meal
      - $20/50 rule applies
      - Know your PMA POC
      - "Straight Arrow" box
  - Holiday/anniversary/birthday cocktail function
    - Contractor party every year at State House
      - Modest item of food and refreshment? What's on the menu?
      - Know contractor counsel
  - Contractor employee
    - CSS brings in donuts every Friday
    - Even if permitted under an exception, it may be prudent to decline a gift offered by a prohibited source

Some Common Gift Situations

- **Farewell Gifts from Contractors**
  - $20/50 Rule applies
  - Gift of little intrinsic value okay (plaque, trophy, etc.)
  - The “going away cake”- share with the office?
- **Travel**
  - in the contractor’s vehicle/aircraft, etc. relating to official duties is a gift to the Government. Is it required as part of the contract? If not, process under 31 USC 1353, NAVAIRINST 4001.1A
    - Offer in writing from source
    - 11.4 reviews, prepares Point Paper for Gift Acceptance Authority (AIR-00)
    - Must be accepted PRIOR TO travel
    - The alternative? Travel with the contractor representative to the Government meeting in Government vehicle.
  - Personal travel in contractor’s car
    - Local lunch, then it’s a $20/50 analysis
- **Hospitality**
  - Visiting the contractor’s suite at the baseball game.

Some Common Gift Situations

- **The Golf Tournament**
  - *Hypothetically…*$35 gets you: greens fee, cart, two mulligan tickets good for raffle at the picnic dinner afterwards, the picnic dinner, beer and soda on the course, goodie bag (sleeve of *Titleist* balls, golf towel, hat, tees, bag ID tag, bag of M&Ms, peanut butter and crackers). Raffle afterwards consisted of shirts, umbrellas, gift certificates, boxes of golf balls and a desk-size model of an airplane. Contractor claimed "everyone pays their fair share…"
    - Gifts are $20/50
    - Raffle is only allowable if open to the general public
      - "Where open to the public, the danger is remote that a prohibited source will use the contest as a means of giving something to an employee or that a reasonable person would question the motive for any prize awarded. Where the contest is not open to the public appearance issues may arise without regard to whether the contest is related or unrelated to the employee's official duties."
        - » OGE Preamble to the Standards of Conduct Regs, 57 FR 35013 (1992)
- **Stuff**
  - contractor coins/trinkets

Contractors in the Workplace
Use of Government Resources

- **Use of contractor employees as logistical support for social event**
  - **Result - contract claim or illegal voluntary services**
- **Inviting contractor employees to attend social event**
  - **Contractor can't charge time to contract**
  - **Can't use Government MWR funds to supplement contractor employees ticket**
  - **Contractor must pay for its employees**
  - **Consider appearance issues**

Contractors in the Workplace
Use of Government Resources

- Employees have a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.
  - **Government property includes an intangible interest that is purchased with Government funds, including the services of contractor personnel.**

- The PMA Annual Picnic/Halloween Party
  - Contractor wants to assist in the set-up/food purchase
    - Is it within the terms of the contract?
    - Should Government authorize/direct contractor employees?

Contractors in the Workplace
Use of Government Resources

- **Contractor use of Government office space, telephone, e-mail, computers, etc.**
  - **Contractors are usually required to provide property necessary for performance of the contract (FAR 45.102)**
  - **Government may supply property if cost effective, in Government's best interest (FAR 45.509-2)**
  - **Proper use of Government equipment is governed by the terms of the contract**
- **Local instructions for use of Government property do not apply to contractor employees**
  - **Contracting Officer should discuss issue with contractor supervisor**
- **Contract can be written to make the same rules apply (but not sanctions for violations)**

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Contractors in the Workplace
Use of Government Resources

- **Awards to contractor members of IPTs**
  - **Coordinate with the contracting officer**
    - **Look to terms of the contract**
    - **Contractor award program**
  - **Honorary recognition only – no cash awards**
    - **Letter of appreciation/non-monetary certificate**
  - **Can recognize efforts of team members but not with cash awards**

Contractors in the Workplace
Use of Government Resources

- **Contractor Identification (FAR 37.114(c))**
  - **Distinct badging**
  - **Marking office space**
  - **Identification on e-mail address**
  - **Identification when answering phone**
  - **Identification when using Government letterhead**
  - **Identification when using Government fax & fax cover sheet**
  - **Identification on business cards**

Contractors in the Workplace
Use of Government Resources

- **Endorsement of Contractor's Product**
  - **Don't use official Government title/position**
  - **Avoid appearance of endorsement from display of contractor logos (coffee mugs, business cards & brochures)**
- **Character reference/letter of recommendation**
  - **Use of Government letterhead or title/position only if based on personal knowledge gained in official capacity**
  - **Coordinate with Contracting Officer**

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Contractors in the Workplace
Personal Services

- **Contractors are not Government employees**
- **It is illegal to receive personal services from a contractor**
- **Personal Services Contract -- any contract that, by its express terms or as administered, makes the contractor personnel appear to be Government employees**

Contractors in the Workplace
Personal Services

Key indicia of personal services contracts

1. Performance on-site
2. Principal tools and equipment furnished by the Government
3. Services are applied directly to the integral effort of the command in furtherance of its assigned function or mission
4. Comparable services are performed elsewhere in the same activity or at other activities by Government employees
5. Need for the service provided can reasonably be expected to last beyond

Contractors in the Workplace
Personal Services

- **Avoid personal services: Do not treat contractor employees as if they were Government employees:**
  - **Do not direct step-by-step**
  - **Do not supervise performance**
  - **Do not "hire" or "fire" or "approve" leave**
  - **Do not discipline**
  - **Do not include contractors in your training classes**
    (unless by contract or upon advice of counsel)
  - **Only the Contracting Officers Representation (COR) can direct performance**

Contractors in the Workplace
Personal Services

- **Contractor employees may not perform inherently Governmental functions**
- **Those functions that are so intimately related to the public interest to mandate performance by Government employee**
- **Includes activities which require the exercise of discretion in applying Government authority or use of value judgment in making decisions**

Contractors in the Workplace "Switching Sides"

- **Disqualification while a Government employee**
  - **18 USC 208, 5 CFR 2635.604**
- **Taking a job with the Contractor**
  - **18 USC 207 and 41USC 423**

- Switching Sides:
  - *I don't even have to empty my desk…I'll be doing the same job….!*

Contractors in the Workplace Non-Public Information

- **Balancing Act - protection of sensitive Government information vs. contractor's need to know**
- **Restrictions on NAVAIR employees**

-NAVAIRINST 12752.1

-Procurement Integrity Act (41 USC 423) -shall not knowingly disclose contractor bid or proposal information

-Disclosure of Confidential Information (18 USC 1905) -publishes, divulges or makes known trade secret,... confidential data, ...

-Use of Non-Public Information (JER, 5 CFR 2635.703) -shall not engage financial transaction using non-public information to further his or private interest

-Contract Restrictions

Contractors in the Workplace
Non-Public Information

- **If contractor is given access to non-public information:**
  - **It has now been released outside the Government and Government control**
  - **Contractor employees are not covered by same laws and regulations**
  - **Contractor employees are subject to Bribery Statutes/ Privacy Act**

Contractors in the Workplace
Non-Public Information

- **Before giving access to non-public information:**
  - **(1) Do you have the legal right to do so?**
  - **(2) Do you need permission to do so?**
  - **(3) Is the purpose of using it within the scope of the contract?**
  - **(4) Is there a need to know?**
  - **(5) Has contractor promised not to further disclose?**
    - **in the contract**
    - **by separate agreement**

Contractors in the Workplace Practical Advice

- **Contractor employees are not Federal employees**
- **Beware of gifts from contractor employees. Even if they work in the Federal workplace, they are "outside sources" and the rules for their gifts are very different than the rules for gifts between employees**
- **Identify contractor employees:**
  - **distinctive security badges, company's name in e-mail address, answering phones, attending meetings**
- **Ensure Government employees and the public understand contractor status**

Contractors in the Workplace Practical Advice

- Avoid appearances of endorsement
- Awards to contractors: honorary only, no cash
- Proper use of Government resources is governed by the terms of the contract
- Contractor only provides those services set forth in the contract: no other duties as assigned
- Respect employer-employee relationship between contractors and their employees
  - Do not try to influence use of “favorite” employees
  - Do not get involved in hiring, firing or discipline

Contractors in the Workplace Practical Advice

- **Safeguard proprietary, Privacy Act, and other sensitive and nonpublic information**
- **Avoid incumbent contractor unfair competitive advantage**
  - **Do not include contractor in meetings to discuss re-competition**
  - **Do not allow contractors access to planning information**

- ***And Finally…***
  - **Know your contractor's attorney**

Back-Up Material

Procurement Integrity Act

Government employees

- **Shall not knowingly disclose procurement information before the award of a contract to which it relates**

- **Shall not knowingly obtain procurement information before the award of contract to which it pertains**

Procurement Integrity Act

- **Applies to:**
  - **present and former officers and employees**
  - **anyone who assisted with procurement**
  - **anyone who had access to source selection information**

Procurement Integrity Act

What information is protected from disclosure?

Contractor bid or proposal information:

- cost or pricing data
- labor rates
- proprietary information
- information marked by the contractor as “Contractor Bid or Proposal Info”

Procurement Integrity Act

What information is protected from disclosure?

Source Selection Information

- bid prices before bid opening
- proposed costs or prices
- source selection plans
- technical evaluation plans
- evaluations of technical proposals
- evaluations of cost proposals
- competitive range determinations
- rankings of bids, proposals or competitors
- reports of source selection panels, boards or advisory councils

Procurement Integrity Act

Penalties for Violation

- **Criminal Penalties**
  - 5 years
  - fines
- **Civil Penalties**
  - $50K for each violation plus two times the amount of any compensation offered or received by Government employee in exchange for information

Disclosure of Confidential Information

18 USC 1905

1. Government employees may not divulge information received in the course of their employment or official duties
2. Covers information related to: trade secrets, processes, operations, style of work, statistical data, or information relating to profit, losses or sources of income of any person, firm, partnership or corporation
3. Penalty: Fine and/or 1 year in prison: must be removed from employment

Joint Ethics Regulations
5 CFR 2635.703

Use of Non-Public Information

- Government employee may not engage in any financial transaction using non-public information
- May not allow the use of non-public information for employee's private gain or for someone else's private gain
- Whether by advice, recommendation or unauthorized disclosure